

CALIFORNIA ENERGY COMMISSION

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May 23, 2008

Mr. Alexander Karsner
Assistant Secretary for Energy Efficiency
and Renewable Energy
United States Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

**PETITION OF THE CALIFORNIA ENERGY COMMISSION
TO REPEAL THE TEST METHOD FOR TELEVISION SETS IN
10 C.F.R. PART 430 SUBPART B**

Dear Mr. Karsner:

Pursuant to 5 U.S.C. Section 553(e) and 42 U.S.C. Section 6293(b)(2), the California Energy Commission submits the enclosed petition to repeal the test method for television sets in 10 C.F.R. Part 430 Subpart B. An original and six copies of the Petition are enclosed. Please return one file-stamped copy of the Petition in the enclosed stamped, self-addressed envelope.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink that reads "William Staack".

William Staack
Senior Staff Counsel

UNITED STATES DEPARTMENT OF ENERGY

**PETITION OF THE CALIFORNIA ENERGY COMMISSION
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IN 10 C.F.R. PART 430 SUBPART B**



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I. Introduction and Summary.

The California State Energy Resources Conservation and Development Commission (“CEC” or “Commission”) petitions the Secretary of the United States Department of Energy (“DOE”), pursuant to 5 U.S.C. section 553(e) and 42 U.S.C. section 6293(b)(2), to amend the following Code of Federal Regulations (C.F.R.) sections:

- (A) amend 10 C.F.R. section 430.2 by repealing the definition for “Television set”;
- (B) amend 10 C.F.R. section 430.23 by repealing subdivision (h) “Television sets”;
- (C) amend 10 C.F.R. section 430.24 by repealing subdivision (h); and
- (D) amend 10 C.F.R. Part 430, Subpart B, by repealing Appendix H “Uniform Test Method for Measuring the Energy Consumption of Television Sets.”

In 1977 DOE adopted the still-current applicable *analog* test method to measure the energy efficiency of television sets. *See* 10 C.F.R. § 430.23 (h) (2007); *id.* Pt. 430, Subpt. B, App. H. This test method cannot measure the performance of today’s *digital* televisions. This creates two bad results. First, because federal law prohibits the representation by manufacturers, distributors, retailers, and private labelers of energy performance information unless the representation is based on federal test results, *see* 42 U.S.C. § 6293(c), it seems that no energy performance information can be used in the marketing of digital TVs. This prevents consumers from knowing the economic and environmental consequences of their TV choices and from making intelligent purchasing decisions. Second, there are no federal efficiency standards for televisions.¹ Ordinarily, the absence of federal standards for a federally-regulated appliance would allow the states to set efficiency standards for that appliance. *See* 42 U.S.C.

¹ The following summarizes DOE’s actions regarding efficiency standards for television sets:

- Published Advance Notice of Rulemaking. *See* 44 Fed. Reg. 72,276, 72,280 (Dec. 13, 1979).
- Proposed “no-standard” standards. *See* 50 Fed. Reg. 12,966, 12,978 (Apr. 1, 1985).
- Withdrew “no-standard” standards due to decision in *NRDC v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985) that invalidated “no-standard” standards. *See* 51 Fed. Reg. 7582 (Jul. 16, 1985).
- Proposed that standards are not economically justified. *See* 53 Fed. Reg. 46367 (Dec. 2, 1988).
- Finding of No Significant Impact and proposal for no standards. *See* 53 Fed. Reg. 48798 (Dec. 2, 1988).
- New analysis needed; postponed final decision. *See* 54 Fed. Reg. 47916, 47917, 47941 (Nov. 17, 1989).
- Withdrew proposed standards. *See* 60 Fed. Reg. 32627 (Jun. 23, 1995).

§§ 6297(b)-(c) (appliances in general), 6297(b)(6) (televisions). However, because state standards must be based on the applicable federal test method, if one exists, *see* 42 U.S.C. §§ 6297(a), 6297(f)(3)(G), it is a practical impossibility for the states to adopt standards for modern digital TVs because the federal test method, although on the books, cannot measure the performance of those models. In sum, DOE is not acting and the states cannot act, and as a result large energy and economic savings are not being achieved.

II. Material Required by 5 U.S.C. Section 553(e) and 42 U.S.C. Section 6293(b)(2).

The Commission submits this petition pursuant to the provisions of 5 U.S.C. section 553(e), which grants to “an interested person” the “right to petition [DOE] for the . . . repeal” of the test method codified in 10 C.F.R. Part 430 Subpart B. The Commission qualifies as “an interested person” because it is defined as a person (i.e., a public organization) in 5 U.S.C. section 551(2), and has a legally derived interest pursuant to state law, *see* Cal. Pub. Res. Code § 25402, where it is required to adopt regulations in order to reduce wasteful, uneconomic, inefficient, and unnecessary consumption of energy. The Commission believes that energy efficiency standards for TVs would benefit manufactures, retailers, consumers, and utilities in California, but the existence of the outmoded federal test prevents the Commission from taking action. Therefore, the Commission is “an interested person.” Moreover, DOE has the authority to act on this Petition: pursuant to 42 U.S.C. section 6293(b)(2), “[i]f the Secretary [of DOE] determines . . . in response to a petition . . . that a test procedure should be . . . amended, the Secretary shall promptly publish in the Federal Register the proposed [amendment] . . . and afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such [amendment]”

III. The Federally-Covered Consumer Product “Television Sets” Includes Both Digital and Analog Televisions.

“Television sets” are a federally-covered consumer product. 42 U.S.C. § 6292(a)(12). DOE has defined television sets very simply, as either a “color television set or a monochrome television set.” 10 C.F.R. § 430.2. This definition clearly encompasses both analog and digital television sets, as nothing in the definition can be read as excluding either type. In fact, the U.S. EPA has recently developed a definition of televisions for their Energy Star Program that includes

both analog and digital television sets. *See* U.S. EPA's Energy Star Program Requirements for Televisions, section (1)(A), Final Version 3.0 (2008).

IV. The Applicable Federal Test Method for Television Sets Does Not Measure Digital Television Performance.

The applicable federal test method for television sets, prescribed on September 14, 1977 and codified in 10 C.F.R. section 430.23 (h) and 10 C.F.R. Part 430, Subpart B, Appendix H, measures energy efficiency by use of analog test signals provided by specified testing equipment. *See* 42 Fed. Reg. 46140 (Sept 14, 1977). Energy efficiency of the TV is determined by measuring power consumption when inputting specified test signals mandated in the federal test method. *See* 10 C.F.R. Part 430, Subpart B, Appendix H, sections 2.1 and 2.3. One problem with the applicable federal test method is that it cannot measure power consumption of digital television sets because the digital tuner in these TV's cannot process the mandated analog test signals.² A second problem is that analog television sets, which accounted for only 4 percent of the estimated 32 million units sold in the United States in 2007, Consumer Electronics Association, <http://www.twice.com/article/CA6478983.html> (Sept. 17, 2007), will soon be completely unavailable to consumers, causing the federal analog test method to become obsolete.

The demise of analog television sets is the result of a mandate by Congress that after 11:59 p.m. on February 17, 2009, all full-power television broadcast stations must transmit only digital signals and end transmission of analog signals. *See* Digital Television and Public Safety Act of 2005, 47 U.S.C. 309(j)(14)(A). To assist consumers, the Federal Communications Commission has established a digital tuner mandate, which requires that all television sets sold after March 1, 2007, be capable of receiving digital signals over-the-air. *See* 47 C.F.R. § 15.117(i). This will make the current federal analog test method obsolete.

² The analog signals used in the federal test method are radio frequency (RF) television test signals, at a very high frequency (VHF) channel, and modulated with the National Television System Committee composite video. 10 C.F.R, Pt. 430, subpt. B, App. H § 2.1. As a technology, analog is the process of taking information in the form of an audio and video image (e.g., a human voice and its image from a television studio) and translates it into electronic pulses. Digital on the other hand takes the audio and video image and translates the information into binary data represented by a series of "1"s and "0"s. The television set requires a tuner (i.e., a translator) to convert the input signals into an audio and visual image for viewing of television shows. Analog TV's use an analog tuner that can only process analog signal inputs and digital TV's use a digital tuner and can only process digital input signals. Summary was adapted from internet article: "Analog. Digital. What's the Difference?" by Paul Wotel. <http://telecom.hellodirect.com/docs/Tutorials/AnalogVsDigital.1.051501.asp>, Copyright © 1996-2004 Hello Direct.

Unfortunately, the applicable and only federal test method for television sets is the obsolete analog test method adopted in 1977, and states are preempted from adopting a suitable test method for measuring the performance of digital television sets being sold today. *See* 42 U.S.C. § 6297(a)(1)(A). This is because such a test method would require “testing” and “the use of” a “measure of energy consumption” based on *digital* test signals, which would be in a “manner other than that provided under [42 U.S.C.] section 6293” – i.e., in a manner other than the analog test signal mandated by the applicable federal *analog* test method. 42 U.S.C. § 6297(a)(1)(A).

V. The Applicable Federal Test Method Conflicts with the Governing Federal Statute Because It Is Not “Reasonably Designed” To Measure Digital TV Performance.

NAECA requires that federal test methods adopted by DOE be “reasonably designed” to “measure energy efficiency and energy use” of federally covered products. 42 U.S.C. § 6293(b)(3). The current federal test method for television sets conflicts with this requirement: although the analog test method was “reasonably designed to measure energy efficiency” for analog television sets sold in 1977, because it cannot measure energy efficiency of today’s digital television sets it no longer “measures energy efficiency” for television sets being sold and therefore no longer meets the requirements of 42 U.S.C. section 6293(b)(3).

VI. Because the Applicable Federal Test Method Preempts Other Test Methods, It Prevents Needed Information from Being Disseminated in the Marketplace.

A. The FTC Cannot Prescribe Labeling Requirements for Digital Televisions.

Not only is the current test method inadequate, but its mere existence prevents needed information from entering the market. Federal law requires that “not later than 18 months after the date of issuance of *applicable* Department of Energy testing procedures, the [Federal Trade] Commission . . . shall by regulation, prescribe labeling or other disclosure requirements for the energy use of . . . televisions.” 42 U.S.C. § 6294(a)(2)(I)(i)(I) (emphasis added). Because the 1977 federal analog test method is not “applicable” to digital television sets, the requirement of 42 U.S.C. section 6294(a)(2)(I)(i)(I), to adopt “labeling or other

disclosure requirements for the energy use . . . [of] televisions,” cannot be met by the Federal Trade Commission. (Moreover, if “applicable” is interpreted in its strictly legal sense – i.e., that the current test method is “applicable law” – then the FTC cannot even use its discretionary authority to prescribe labels based on an alternative test method, because that authority exists only “[i]n the absence of applicable testing procedures” adopted by DOE. 42 U.S.C. § 6294(a)(2)(I)(ii).

B. Manufacturers, Distributors, Retailers, and Private Labelers Are Prohibited from Using Energy Efficiency Data Generated from Digital Test Methods in the Advertising and Marketing of Digital Televisions.

Furthermore, the restriction on FTC labeling of digital televisions is not the worst hurdle faced by consumers eager to get reliable information about the energy performance of TVs. Manufacturers, distributors, retailers, and private labelers are prohibited from making “any representations” concerning energy use, or energy cost, for the purpose of advertising and marketing digital television sets (or any other appliance) unless the TV “has been tested in accordance with,” and the representation “fairly discloses the results of,” the applicable federal test method. 42 U.S.C. § 6293(c).

Because the applicable federal analog test method cannot as a practical matter be used to measure the “energy use or efficiency” or “cost of energy consumed” of digital television sets, “any representation” concerning energy use would have to be based on a digital test method in order to be accurate. However, a representation based on such a test method would run afoul of the requirement that testing must use the current applicable federal test method in 42 U.S.C. §§ 6293(c), 6297(a). The result is that manufacturers, distributors, retailers, and private labelers are prohibited from making any representation concerning energy use, energy efficiency, or cost of energy consumed of digital television sets, because the use of digital test method is restricted under federal law.

C. Consumers Will Not Have Energy Efficiency Information To Assist Them In Making Informed Purchases of Digital Television Sets.

In sum, consumers will have the benefits of neither federal labels nor information from the industry. These federal restrictions will severely limit the availability of critical energy efficiency information for digital TV customers – which the Consumer Electronic Association estimates will total 33.4 million sales

in 2008, 35.2 million in 2009 and 36.4 million in 2010. 73 Fed. Reg. 5634, 5640 (Jan. 30, 2008).

VII. Because of the Applicable Federal Test Method is Obsolete, the States Are Inappropriately Preempted from Adopting Highly-Cost-Effective Efficiency Standards for Television Sets.

In theory, the states are not preempted from adopting energy standards for digital television sets -- because there are no federal energy conservation standards. *See* 42 U.S.C. § 6297(b)(6); 10 C.F.R. § 430.32(l). However, in reality, the states cannot adopt such standards because they are federally-preempted from adopting the necessary enabling digital test method by 42 U.S.C. section 6297(a)(1)(A). Thus the retention of the obsolete federal analog test method has created a regulatory obstacle that in effect abrogates the authority granted by Congress for states to adopt efficiency standards for appliances where DOE has failed to act. This regulatory obstacle is analogous to the results caused by DOE's "no-standard" standards where states were preempted from adopting state standards because DOE adopted "no-standard" standards. The adoption of "no-standard" standards was struck down by the federal court in NRDC v. Herrington, 768 F.2d 1355 (D.C. Cir. 1985). Congress certainly did not intend a similar result of no standards for TV's just because of an obsolete analog test method unnecessarily remaining on the books.

VIII. Conclusion.

This Petition has demonstrated that the obsolete analog test method in 10 C.F.R. part 430 Subpart B directly conflicts with Federal and state energy conservation goals as established by Congress:

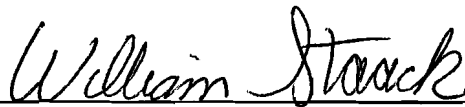
1. The federal analog test method is not reasonably designed to measure energy efficiency and energy use of digital televisions, which violates the requirements for adopting test methods in 42 U.S.C. section 6293(b)(3).
2. The Federal Trade Commission appears unable to prescribe labeling or other disclosures of energy use for digital televisions.

3. The Federal Trade Commission appears unable to identify alternative testing procedures for purposes of prescribing labeling or other disclosures of energy use for digital televisions.
4. Manufacturers, distributors, retailers, and private labelers may not be able to make any energy-related representations when advertising and marketing their digital televisions.
5. Customers will be deprived of important energy efficiency information available in which to make an informed decision when they purchase digital televisions.
6. States are effectively preempted from adopting efficiency standards for digital televisions.

For all of these reasons, DOE should repeal the current television test method.

May 23, 2008

Respectfully submitted,



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STATE OF CALIFORNIA
Energy Resources
Conservation and Development Commission

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. My business address is 1516 9th Street, Sacramento, California 95814. On May 23, 2008, I served the following document:

**PETITION OF THE CALIFORNIA ENERGY COMMISSION
TO REPEAL THE TEST METHOD FOR TELEVISION SETS
IN 10 C.F.R. PART 430 SUBPART B**

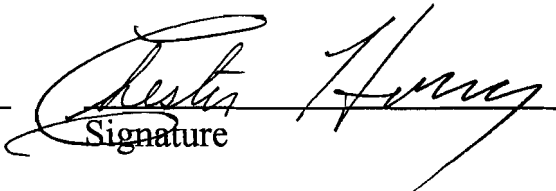
 X by U.S. Mail – by placing a original thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail at Sacramento, California addressed as set forth below:

Mr. Alexander Karsner
Assistant Secretary for Energy Efficiency and
Renewable Energy
United States Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 23, 2008, at Sacramento, California.

CHESTER HONG
Print Name


Signature